No. 193.

In Supreme Court of the United States,

October Term, 1899.

SETH CARTER, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR, THE STATE OF TEXAS, BY HER ATTORNEY-GENERAL, T. S. SMITH.

STATEMENT OF THE CASE.

The plaintiff in error, Seth Carter, brings this case to the Supreme Court of the United States by means of a writ of error, issued December 16, 1898, out of the Circuit Court of the United States for the Eastern District of Texas, directed to the Court of Criminal Appeals of the State of Texas, which said court is the court of last resort in the State of Texas for all criminal causes. As there is no brief on file in the United States Supreme Court on behalf of the plaintiff in error, the State of Texas, by her Attorney-General, T. S. Smith, files this brief for the State of Texas, defendant in error, and relies for the facts of the case and for the assignments of error upon which a reversal of the case is sought, upon the printed "transcript of record" filed herein on the 20th day of January, 1899.

This cause originated in the county of Galveston, and State of Texas. On the 26th day of November, 1897, the grand jury in and for Galveston county presented to and caused to be filed in the Criminal District Court of Galveston county, an indictment against plaintiff in error, charging him with murder of Bertha Brantley, on November 24, 1897. (Tr., p. 2.)

On March 7th, 1898, the court entered an order for the clerk of the court to issue a writ commanding the sheriff of Galveston county to summon 150 persons, whose names appear on the list to be attached to said writ, to be and appear before the Criminal Dis-

trict Court of Galveston county, at 10 o'clock a. m., March 17, 1898, the day set for the trial of plaintiff in error, to serve as jurors in the trial thereof. (Tr., pp. 2 and 3.) Upon the day set for the trial of the cause, the plaintiff in error filed the following motion to quash the indictment:

"The State of Texas, Galveston County:

State of Texas, vs. Seth Carter. } No. 11,876.

In the Criminal District Court, March term, 1898.

And now comes the said defendant, in his own proper person, and moves the court to set aside and quash the indictment herein against him, because the jury commissioners appointed to select the grand jury which found and presented said indictment selected no person or persons of color or of African descent, known as negroes, to serve on said grand jury, but, on the contrary, did exclude from the list of persons to serve as such grand jurors all colored persons or persons of African descent, known as negroes, because of their race and color, and that said grand jury were composed exclusively of persons of the white race, while all persons of the colored race, or persons of African descent, known as negroes, although consisting of and constituting about one-fourth of the population and of the registered voters in said city and county of Galveston, and, although otherwise qualified to serve as such grand jurors, were excluded therefrom on the ground of their race and color, and have been so excluded from serving on any jury in said criminal district court for a great many years, which is a discrimination against the defendant, since he is a person of color and of African descent, known as a negro, and that such discrimination is a denial to him of the equal protection of the laws and of his civil rights guaranteed by the Constitution and laws of the United States; all of which the defendant is ready to verify.

"SETH CARTER."

"Sworn to and subscribed before me this 13th day of January, 1898.

FLORENCE T. ATKINS,

"Notary Public, Galveston county, Texas."

"Filed March 17, 1898.

C. J. ALLEN,

"Clerk of the Criminal District Court, Galveston county, Texas."

The court overruled the motion, to which ruling the plaintiff in error reserved his bill of exceptions. (Tr., p. 4.)

An examination of the record fails to disclose the fact, if such were the fact, that any witness or witnesses were introduced to testify upon the allegations as contained in the motion to quash the indictment; at least, no witness was tendered to the court.

"Bill of Exceptions, No. One. Filed March 30, 1898.

The State of Texas, vs. Seth Carter. } No. 11,876.

In the Criminal District Court, Galveston county, Texas, March term, A. D. 1898.

Be it remembered that on the 17th day of March, 1898, the above entitled and numbered cause was called for trial, and the defendant, in open court, before he was arraigned, and before pleading to the indictment, presented and read to the court the following motion to quash the said indictment, towit:

(Here follows copy of motion to quash as shown above herein.)

After reading the said motion, the defendant asked leave of the court to introduce witnesses, and offered to introduce witnesses to prove and sustain the allegation therein made, but the court refused to hear any evidence in support of the said motion, and thereupon overruled the same without investigating into the truth or falsity of the allegations of said motion; to which action of the court the defendant then and there excepted, and tenders this his first bill of exceptions, and asks that the same be signed and filed as a part of the record in this case.

WILFORD H. SMITH.
"Attorney for Seth Carter."

"The foregoing bill of exceptions is approved, allowed and ordered to be filed by the clerk as a part of the record in this cause, this 30th day of March, 1898.

E. D. CAVIN.
"Judge of the Criminal District Court of Galveston Co., Texas."

Plaintiff in error presents and has the court to allow his bill of exceptions No. 2, filed March 30, 1898. (See Tr., pp. 23 and 24.)

The printed record of the case does not disclose the motion to quash the panel of petit jurors, except as the same is included in

bill of exceptions No. 2, as shown above. Other bills of exceptions are filed in the case, but it is not necessary to further refer to them in this brief, as they present no *Federal question* whatever. The plaintiff in error was convicted of murder in the first degree and his punishment assessed at death.

On March 19, 1898, he filed his motion for a new trial, and included therein the grounds as set out in bills of exceptions Nos. 1 and 2. (Tr., p. 27.) This motion was overruled by the court on the same day. (Tr., p. 29.)

After the motions for new trial and arrest of judgment were overruled, notice of appeal to the Court of Criminal Appeals was duly given and entered of record. (Tr., p. 29.)

An opinion was filed and delivered June 8, 1898, by the Court of Criminal Appeals, the court of last resort in Texas in all criminal matters, which affirmed the opinion of the Criminal District Court of Galveston county.

A motion for rehearing of the case was filed June 18, 1898, by plaintiff in error. (Tr., p. 37.)

The Court of Criminal Appeals delivered a lengthy opinion upon the motion for rehearing, December 7, 1898, overruling said motion. (Tr., pp. 39-44.)

Upon the 16th day of December, 1898, a writ of error to the judges of the Court of Criminal Appeals of the State of Texas, issued out of the Circuit Court of the United States for the Eastern District of Texas.

The following are the assignments of error filed December 21st, 1898, by plaintiff in error:

"Seth Carter, Plaintiff in Error, vs. The State of Texas, Defendant in Error. } In the Court of Criminal Appeals of the State of Texas.

And now comes the said plaintiff in error, by his attorney, and makes the following assignment of error in the rulings and proceedings of the court below, upon which he relies, and expects to obtain a reversal in the Supreme Court of the United States, towit:

FIRST ASSIGNMENT OF ERROR.

Because the Court of Criminal Appeals should have reversed the case because of the error in the trial court in overruling the defend-

ant's motion to quash the indictment, and to quash the panel of petit jurors empaneled to try the cause, the said motions being made on the ground that the jury commissioners appointed to select the list of petit jurors from which the panel was drawn which tried the plaintiff in error selected no persons of color or of African descent, known as negroes, to serve on said grand or petit jury, but, on the contrary, did exclude therefrom all persons of color or of African descent, known as negroes, although consisting of and constituting about one-fourth of the population and of the registered voters in said city and county of Galveston, and although otherwise qualified to serve as such grand and petit juries, were excluded therefrom on the ground of their race and color, and have been so excluded from serving on any jury in said Criminal District Court for a great number of years, which is a discrimination against the plaintiff in error, since he is a person of color and of African descent, known as a negro; and that such discrimination is a denial to him of the equal protection of the laws, and of his civil rights guaranteed by the Constitution and laws of the United States; to which ruling of th court the plaintiff in error duly excepted, which exception appears of record in the case.

SECOND ASSIGNMENT OF ERROR.

Because the Court of Criminal Appeals should have reversed the case because of the error in the trial court in refusing to permit the plaintiff in error to introduce evidence in support of and to prove the allegations of his motions to quash the indictment and to quash the panel of petit jurors empaneled to try said cause and in disposing of said motions without permitting an investigation of the matters of fact therein alleged; to which action of the court the plaintiff in error duly excepted, which exception appears of record in the case.

Wherefore, the plaintiff in error prays that the judgment and sentence of the said trial court and of the said Court of Criminal Appeals of the State of Texas be reversed and held for naught.

WILFORD H. SMITH,

Attorney for Seth Carter, Plaintiff in Error."

It is not considered necessary in this brief to attempt to review the testimony of the great number of witnesses in the case in order

to make out, on behalf of defendant in error, a case of murder in the first degree. The testimony shows that plaintiff in error was desperately in love with Bertha Brantley long before she obtained a divorce from her husband, which occurred November 12th, 1897, just twelve days before her death. This was a case of deliberate murder in the first degree, perpetrated by plaintiff in error, arising out of his enraged jealousy upon hearing that Alberta was about to remarry Dennis Brantley.

ARGUMENT.

This is not a case in which there was any attempt to remove the case from the Criminal District Court of Galveston county into the Circuit Court of the United States by or under the authority of Article 641, Revised Statutes of the United States.

There is no allegation made nor question raised that the Constitution or laws of the State of Texas in any way discriminated against the negro because of his race or color, or on account of his previous condition of servitude. The only question presented is whether plaintiff in error has been denied by the State courts any rights, franchises or immunities as guaranteed him by the Federal Constitution and laws. If he has, then under the decisions of this court his injury can be redressed by the exercise of the revisory power of this court. The plaintiff in error alleges that he was discriminated against because of his race and color, and denied his civil rights under the Constitution and laws of the United States, for the alleged reason that the jury commissioners, consisting of three persons, whose duty it is under the laws of the State of Texas to select grand and petit jurors for the ensuing term of the court, failed to select any negroes to be members of said grand jury and petit jury because of their race and color. He further alleges in his motion to quash the indictment that negroes have been excluded from serving on any jury in said Criminal District Court for a great many years on account of their race and color, which is a discrimination against him and a denial to him of his just rights under the Federal Constitution and laws, because he is a person of color, known as a negro.

The Act of Congress of March 1st, 1875, Chap. 114, provides that "no citizen, possessing all other qualifications which are or

may be prescribed by law, shall be disqualified from service as grand or petit jurors in any court of the United States, or of any State, on account of race, color or previous condition of servitude."

In the case of Neal vs. Delaware, 103 U. S., it was conceded in the court below as well as in argument before this court that colored persons had always been excluded from juries in the courts of Delaware. In that case, it was shown that the Constitution and laws passed before the war and which excluded negroes from suffrage and from serving on juries had never been changed after the adoption of the thirteenth, fourteenth and fifteenth amendments to the Federal Constitution and laws which were passed to carry out the purpose of said amendments, but this court held that in view of the fact that the Court of Oyer and Terminer of Delaware recognized the Federal Constitution and laws as being the supreme law of the land, it made no difference that such *formal* change had not been effected. Such is not the case with the State of Texas. Her Constitution and laws have been made to conform to the Federal Constitution and laws. If it were a matter of which the State court could take judicial cognizance, as to her citizens of all color serving on grand and petit juries, as mention of such is made in this case, page 397, then could the Court of Appeals of Texas take such judicial knowledge, because it is consistent with both the law and the facts.

It is not conceded, as in the case of Neal vs. Delaware, that negroes are excluded from the juries in this State, but it is denied that such is the case, and the presumption is that they vote and serve on juries. The contrary must be proved when it is so alleged. In the case above cited, the accused made a motion to have subpœnas issued for the commissioners of the levy court, which court makes the annual selection of grand and petit jurors, also for the clerk and bailiff of said levy court. This was objected to by the attorney-general of the State of Delaware, the motion to quash the indictment and panel of petit jurors having already been passed upon. The motion for subpœnas was denied by the court on the ground that it was without precedent and was not according to the practice of the Court of Oyer and Terminer.

In this case the Supreme Court says: "But passing by this ruling of the court below as insufficient in itself to authorize a reversal of the judgment, we are of the opinion that the motions to quash, sustained

by the affidavit of the accused—which appears to have been filed in support of the motions without objection to its competency as evidence, and was uncontradicted by counter affidavits, or even by a formal denial of the grounds assigned—should have been sustained. If, under the practice which obtains in the courts of the State, the affidavit of the prisoner could not, if objected to, be used as evidence in support of a motion to quash, the State could waive that objection, either expressly or by not making it at the proper time. No such objection appears to have been made by its Attorney-General. On the contrary, the agreement that the prisoner's verified petition should be treated as an affidavit 'in the consideration and decision of the motions,' implied, as we think, that the State was willing to risk their determination upon the case as made by that affidavit, in connection, of course, with any facts of which the court might take judicial notice."

The Supreme Court of the United States, following the above language, says that the showing as made by the affidavit, together with the fact that no colored citizen had ever been summoned as a juror in the State, which fact was so generally known that the court felt bound to take judicial knowledge of it, made out a *prima facie* case against the State, through her subordinate officers, of a discrimination against the accused, hence a denial to him of his rights as a citizen under the Federal Constitution and laws.

The case at bar, however, is not such a case as the one above considered. There was no petition for removal of the cause into the Circuit Court of the United States verified by the accused; no agreement on the part of counsel for the accused and the prosecuting attorney that the affidavit of plaintiff in error could be used as proof of the allegations contained in his motions to quash the panel of grand jurors and the panel of petit jurors; no fact of which the district judge could take judicial cognizance, such as that no negro had ever sat on the jury in the courts of the State of Texas. All these things, the necessary and material elements in the denial of his civil rights to the accused in the case of Neal vs. Delaware, are wanting in the case at bar. Here we have a record showing that the motion to quash the indictment was sworn to on the 13th day of January, 1898, and came up for a hearing on the trial of the cause March 17th, 1898, more than two months thereafter. Under the practice of the trial courts of this State, the accused should, before

the case was called for trial, have caused to be issued subpœnas for the witnesses by whom he expected to prove the allegations in his motion. He should have tendered the witnesses in person and by name to the court, and if the court refused to hear testimony, then and there, by his attorney, the accused had the right to take time to prepare his bill of exceptions and to put therein what he expected to prove by each witness. Article 724 of the Code of Criminal Procedure, R. S. of Texas, 1895, is as follows: "On the trial of any criminal action the defendant, by himself or counsel, may tender his bill of exceptions to any decision, opinion, order or charge of the court or other proceedings in the case, and the judge shall sign such bill of exceptions, under the rules prescribed in civil suits, in order that such decision, opinion, order or charge may be revised upon appeal."

Under the procedure of the State of Texas, if there is a direct conflict between a fact as stated in the statement of facts and as given in a bill of exceptions, the higher court will look to the bill of exceptions as correctly stating the fact. However, it is not to be understood that the approval by the trial court of a bill of exceptions as tendered by the accused and an order to file same, is an admission by the court that everything contained therein *is true* as a matter of fact.

In the case of Henry Smith vs. The State of Texas, 4 Texas Ct. of Appeals Rep., 630, the defendant was convicted and made a motion for a new trial, which was overruled by the court, and to which ruling the defendant saved his bill of exceptions. In this bill of exceptions, defendant sets out the grounds which were urged for a new trial. The court allowed the bill of exceptions and ordered it to be filed. In the Court of Criminal Appeals, the appellant claimed that the bill of exceptions showed "that actually and in fact there was no plea entered for defendant." The court says: "The specific fact, and the only specific fact, established and sought to be established by the bill was, as we apprehend, that the defendant's motion for a new trial had been overruled, and not that the court intended to admit and certify the fact that the grounds set out in the motion were true and well taken. No other construction is warranted by the bill as stated. Else why, if it be held to certify the fact that no plea was entered, might it not with the same propriety be held that the bill also certifies as facts the two other grounds

of the motion, viz.: 'First, that the verdict of the jury was contrary to the law and to the evidence; second, the verdict of the jury was excessive.'" "We cannot believe that the court in allowing the bill, ever intended to admit as a fact that the verdict was contrary to the law and the evidence or that it was excessive, and yet at the same time have placed itself upon the record as having refused him a new trial, in the face of such facts. To do so would be worse than absurdity; it would be equivalent to a criminal stultification of itself by the court."

In the case of Hennessy vs. The State, 23 Texas Ct. of App. Rep., p. 355, the following language is used: "VII. It is not made to appear that the court erred in overruling defendant's motion to quash and set aside the list of jurors presented him. We are not informed by the bill of exceptions relating to this matter what the facts were concerning the grounds of said motion. By *signing* and *allowing* the said bill the judge did not establish the truth of the grounds set forth in said motion, but simply certified that such a motion had been presented to him for action, and that he had overruled it. In this state of the case we must presume that the objections urged to the list of jurors were not sustained by the facts."

We suggest to this court the distinction which is made in the practice in the Court of Criminal Appeals of Texas, between the case where there is a direct conflict between the statement of facts and a bill of exceptions, and the case of approval of a bill of exceptions and ordering the same filed. In the cases cited above, it is clearly shown that it is not intended by the trial court to accept as true a fact or facts stated in a motion which has been incorporated in a bill of exceptions, nor to verify nor accept as true any statement made by accused or his counsel which is included in the bill of exceptions, simply by approving same and ordering it made a part of the record. That part of the record in this case which involves the point being discussed appears as follows (Tr., pp. 3 and 4):

"The State of Texas,
vs.
Seth Carter. } No. 11,876. Indicted for Murder.

This day this cause was called, and the State appeared by her district attorney, and the defendant, Seth Carter, appeared in person, his counsel also being present, and then came on to be heard the defendant's motion to quash and set aside the indictment herein; and

the same having been heard by the court, it is considered, ordered, and adjudged by the said court that the said motion be, and the same is, in all things overruled, to which ruling of the court the defendant, Seth Carter, in open court excepted."

It is to be presumed that the honorable judge of the trial court did his duty in giving a hearing to the motion of the accused; and it is not left to presumption merely to vindicate him in this respect, if he needed any vindication, but the record itself speaks out in the language above quoted "the same having been heard by the court," and elucidates this part of the discussion. It is an elementary principle of the law, that in our dual system of government, the State and Federal governments are supreme in their respective jurisdictions; but that in case of a conflict, the Federal Constitution and laws of Congress are the supreme law of the land in the sphere of delegated powers. The courts of Texas know this. The motion to quash the indictment raises a question foreign to the record so far as the trial court is concerned, and requires extraneous proof to substantiate the averment. It was a matter of which the court could not take judicial knowledge, either to say that the averment was true or untrue. It required positive proof that the accused was discriminated against on account of his race and color in this particular case at bar, regardless of what had been done by jury commissioners previously thereto. A uniform course of action in this respect might have great weight in determining the question of discrimination in the particular case. To conclude that the court intended, by merely approving the bills of exception and ordering the same filed, to say thereby that the grounds urged in the motions to quash which were included in said bills were true and that the jury commissioners had discriminated against the accused on account of his race and color; or, that the averment of counsel for plaintiff in error to the effect that the court refused to hear any testimony whatever upon the issue raised, which issue, if proved true, was a violation of the spirit and letter of the Constitution and laws of the United States, would be a stultification of himself and which under the clearly expressed views of this court meant a reversal.

It is to be presumed that the trial court did his duty in the premises. It is to be presumed that, at the time he passed upon the motion to quash the indictment, he knew the law of the United States as expressed in the solemn declarations of the highest and

most honorable judicial tribunal of this republic. At the time he approved the bills of exceptions and ordered the same filed, he is presumed to have done so in view of the procedure and practice of the courts of Texas, as expressed by her highest court in criminal matters, viz.: the Court of Criminal Appeals. It may be argued that the trial court should have obviated all difficulty in this matter by having limited or qualified anything contained in the bill of exceptions before having approved same. But in the administration of the criminal laws of this State, and in view of the great amount of work incumbent upon our trial judges and their arduous duties of properly passing upon the admissibility of testimony and properly preparing and giving in charge to the juries the law applicable to the case; and further, in this case, in view of the fact that all these bills of exception were presented for approval some two weeks after the trial of the cause, and just on the day before adjournment of the court, it is not to be supposed that the court would take into consideration every possible view which might arise afterwards upon more mature consideration. It is evident that the Court of Criminal Appeals of Texas did not conclude that the trial court, by his approval of the bills of exceptions, intended to assert as true the statements therein contained. The court uses the following language in their opinion on the motion for a rehearing in this case (Tr., p. 44): "But it is said that here appellant offered to prove the allegations of his motion and the court refused to permit him." The language used in the Smith case, *supra,* in the motion, also contains a proffer to prove the allegations of the motion by the officers selecting the jury, and prayed for subpœnas for said officers. But the court, in deciding the question, ignored this offer, presumably on the ground of its insufficiency as being too vague, and, in fact, because the testimony of no witness was offered in support of the motion.

The proposition contained in the motion here is still more vague and general. It names no witness or person by whom it was proposed to prove the allegations of the motion. Under the practice in our courts, and we believe under the practice of all courts, a bare proposition to prove certain facts without tendering the witness or witnesses, or stating by whom it was proposed to prove them, would not be sufficient to invoke the action of the court. And the bare recitation that the court refused to hear evidence in support of

said motion is without meaning, because in fact no testimony was tendered by appellant * * *. At any rate, the bill of exceptions on this subject should be so framed as to include all matters sufficient to overcome the presumption of the correctness of the ruling complained of."

In the case of Bush vs. Kentucky, reported in the 107 U. S. Reports, pp. 120-123, the same question is involved as in the case at bar. The statutes and decisions of Kentucky are reviewed by this court. After the adoption of the fourteenth amendment to the Federal Constitution, the legislature of Kentucky twice passed statutes prohibiting persons of the African race from serving as grand or petit jurors. This remained the statutory law of Kentucky till January 26th, 1882. However, the Court of Appeals of Kentucky delivered an opinion June 29th, 1880, in the case of Commonwealth vs. Johnson, in which they declare that the statute law of Kentucky is unconstitutional in so far as it is in conflict with the expressed views of the Supreme Court of the United States, and that henceforth "no person can be lawfully excluded from any jury on account of his race or color." "This question has not been heretofore passed on by this court, and as the duty of selecting and summoning juries is devolved upon merely ministerial officers, we ought to *assume* that, in performing their duties, they obeyed the statute as enacted by the Legislature, and that they excluded colored persons from the jury because the statute declares them to be incompetent, and consequently that the appellee was deprived by the statute of a right which the Supreme Court holds is secured to him by the Constitution."

The grand jury which indicted Bush was selected by jury commissioners appointed before the decision above quoted from. This being the case, it made no difference that it was not shown, by bill of exceptions or otherwise, that any proof was offered in support of the motion to quash or set aside the indictment. It was a question of law, not one of fact. This court says: "We are of opinion that the rule announced by the Court of Appeals in Commonwealth vs. Johnson is consistent with sound reason and public policy; and, in conformity therewith,—in the absence of any evidence that the selection of grand jurors, in May, 1880, was in fact made without discrimination against colored citizens, because of their race,—it should be assumed that the jury commissioners then appointed fol-

lowed the statutes of Kentucky so far as they restricted the selections of grand jurors to citizens of the white race."

Thus it will be seen from the decisions of this court, as well as State courts, that some importance is attached to the presumption that public officers have followed the law in the performance of their official duties. This is as it should be. Especially, we think, ought this to be the rule with reference to our judiciary. It is unnecessary to consider the question as to whether or not the trial court erred in overruling the motion to quash the panel of petit jurors. The trial court may have viewed the motion as did the Court of Criminal Appeals, viz.: that it came too late to be considered, because plaintiff in error had already examined the venire on their *voir dire*, and had passed on each in the box as to his bias or prejudice in the particular case, and had accepted twelve good and lawful men to pass upon his case. We will not discuss this phase of the case for the reason that if the motion to quash the indictment should have been sustained by the trial court, it would have to be sustained because, in the opinion of this court, the jury commissioners discriminated against plaintiff in error in the selection of grand jurors. If this were true, he was discriminated against in the selection, also, of petit jurors who tried him. If not for the reason just given, then because the bill of exceptions contains the statement that the trial court refused to hear any proof on the question of discrimination. If this court should think that this discloses sufficient error to require a reversal of the case, it would apply to the one motion as well as the other.

It is not claimed by plaintiff in error that he was not legally tried by a jury of twelve fair and impartial men. We submit that as presented by the record, the case is such a one as merits the punishment assessed, and we, therefore, respectfully ask that this honorable court affirm the judgment as rendered by the Court of Criminal Appeals of the State of Texas.

T. S. Smith, Attorney-General,
For Defendant in Error.